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IN THE

Supreme Court of the United States

October Term, 1984

AUGUST S. CARSTENS, FRIENDS OF THE EARTH,
Petitioners,

v.

NUCLEAR REGULATORY COMMISSION, UNITED STATES OF AMERICA,
Respondents,

SOUTHERN CALIFORNIA EDISON COMPANY, ET AL.,
Intervenors.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Should a writ of certiorari be granted to review a decision of the Court of Appeals affirming a licensing decision of the Nuclear Regulatory Commission when

(a) the Court of Appeals applied the long-recognized standard of judicial review for administrative agency decisionmaking required by statute and the decisions of this Court and the Courts of Appeals, i.e., that the agency action was supported by substantial evidence and was neither arbitrary nor capricious;

(b) the Court of Appeals followed the precedents of this Court by according appropriate deference to the special expertise of the Commission in areas of scientific and technical uncertainty;

(c) the Commission complied with all substantive and procedural regulations governing this licensing proceeding; and

(d) the Court of Appeals, after reviewing the administrative record, determined that the Commission's licensing decision was supported by substantial evidence and was neither arbitrary nor capricious?

RULE 28.1 STATEMENT

Southern California Edison Finance Company, N.V., Bear Creek Uranium Company and SCE Capital Company are subsidiaries or affiliates of intervenor Southern California Edison Company. Energy Factors, Inc. is a subsidiary of intervenor San Diego Gas & Electric Company.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
SUMMARY OF ARGUMENT	1
REASONS FOR DENYING THE WRIT	3
I. THE COURT OF APPEALS APPLIED THE PROPER STANDARD OF REVIEW TO AFFIRM THE DECISION OF THE COMMISSION	3
A. The Standard of Review Articulated And Applied By The Court Of Appeals Is Consistent With Supreme Court And Court Of Appeals Precedent	3
B. The Court Of Appeals Applied The Proper Standard Of Review And Correctly Determined That Substantial Evidence Supported The Commission's Decision	9
II. PETITIONERS' CONTENTION THAT THE COMMISSION IS NOT ENTITLED TO DEFERENCE BECAUSE IT SUPPOSEDLY LACKS THE EXPERTISE TO APPLY ITS OWN REGULATIONS ON POWER PLANT LOCATION IS BOTH UNTIMELY AND WITHOUT MERIT	14
A. Petitioners' "Expertise" Argument Is Untimely.	14
B. The Court of Appeals Properly Deferred To The Expertise Of The Commission	14
III. THE COURT OF APPEALS CORRECTLY PERCEIVED AND APPLIED THE FACTUAL EVIDENCE ON WHICH ITS DECISION IS BASED	16
A. The Court Of Appeals Understood Completely Petitioners' Unfounded Attempt To Raise The Issue Of The Incapability Of The Cristianitos Fault	17
B. Petitioners' Proposed Interpretation Of The Offshore Zone Of Deformation As A Stipulated Continuous Fault Is A Flagrant Misinterpretation Of The Facts	18
C. Petitioners' Interpretation Of Dr. Slemmons' Testimony Is Again Without Merit	19

Page

. . The Court Of Appeals Correctly Reviewed The "Conservatism" Of The Commission's Findings 20
E. Petitioners' Interpretation Of 10 C.F.R. § 2.752 Remains Frivolous 21
F. The Commission's Regulations Do Not Require Litigation Of The Capability Of The Cristianitos Fault 21
G. Petitioners' Statement Of Facts Is Replete With Arguments Previously Denied By The Court Of Appeals 22
1. Petitioners Had Ample Time To Prepare Their Case 22
2. Admission Of The FSAR Was Not Reversible Error 22
3. The Commission Accorded Proper Weight To The Testimony Of Drs. Luco and Boore.. 23
CONCLUSION 24

TABLE OF AUTHORITIES

CASES — PAGE

Adickes v. *S.H. Kress and Company,* 398 U.S. 144 (1970).. 14

Baltimore Gas & Electric Co. v. *Natural Resources Defense Counsel, Inc.,* 462 U.S. 87 (1983) 2, 8, 10, 11, 12, 13

Bowman Transportation, Inc. v. *Arkansas-Best Freight System, Inc.,* 419 U.S. 281 (1974)..... 4

Cayman Turtle Farm, Ltd. v. *Andrus,* 478 F. Supp. 125 (D.D.C. 1979)..... 6

Citizens to Preserve Overton Park v. *Volpe,* 401 U.S. 402 (1971)..... 4, 11, 17

County of Rockland v. *U.S. Nuclear Regulatory Commission,* 709 F.2d 766 (2d Cir. 1983), *cert. denied,* 104 S. Ct. 485 (1983)..... 4, 7

Environmental Defense Fund, Inc. v. *Environmental Protection Agency,* 489 F.2d 1247 (D.C. Cir. 1973)..... 15

Ethyl Corp. v. *Environmental Protection Agency,* 541 F.2d 1 (D.C. Cir. 1976), *cert. denied,* 426 U.S. 941 (1976)..... 4, 5, 12

Federal Elections Commission v. *Democratic Senatorial Campaign Committee,* 454 U.S. 27 (1981) 4

Federal Power Commission v. *Florida Power & Light Co.,* 404 U.S. 453 (1972)..... 4, 10

Greater Boston Television Corporation v. *F.C.C.,* 444 F.2d 841 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1970) 11

G.U.A.R.D v. *Nuclear Regulatory Commission,* 753 F.2d 1144 (D.C. Cir. 1985)..... 11

In the Matter of Southern California Edison Company, et. al., 14 N.R.C. 1091 (1981) 11

Lawn v. *United States,* 355 U.S. 339 (1958) 14

Lead Industries Ass'n. v. *Environmental Protection Agency,* 647 F.2d 1130 (D.C. Cir. 1980), *cert. denied,* 449 U.S. 1042 (1980)..... 4, 5, 7, 11

Nader v. *Allegheny Airlines,* 426 U.S. 290 (1976) 16

North Anna Environmental Coalition v. *Nuclear Regulatory Commission,* 533 F.2d 655 (D.C. Cir. 1976)..... 4, 7, 15

Penasquitos Village, Inc. v. *National Labor Relations Board,* 565 F.2d 1074 (9th Cir. 1977)..... 15

Public Citizen v. *Foreman,* 631 F.2d 969 (D.C. Cir. 1980)... 6

CASES — PAGE

Public Service Co. of New Hampshire v. *Nuclear Regulatory Commission*, 582 F.2d 77 (1st Cir. 1978), *cert. denied*, 439 U.S. 1046 (1978) 8

Siegal v. *Atomic Energy Commission*, 400 F.2d 778 (D.C. Cir. 1968) 7, 10

Stamper v. *Secretary of Agriculture*, 722 F.2d 1483 (9th Cir. 1984) 15

State of Maine v. *Kreps*, 563 F.2d 1043 (1st Cir. 1977) 6

Vermont Yankee Nuclear Power Corp. v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) 7, 9

Westinghouse Electric Corp v. *Nuclear Regulatory Commission*, 598 F.2d 759 (3rd Cir. 1979) 8

Weyerhauser Co. v. *Costle*, 590 F.2d. 1011 (D.C. Cir. 1978) 6, 11, 16

STATUTES

5 U.S.C. § 706 ..... 3, 10, 17

42 U.S.C. § 2339 ..... 3, 22

REGULATIONS

10 C.F.R. § 1.61(b) 15

10 C.F.R. § 2.714(b) 22

10 C.F.R. § 2.752(a) 21

10 C.F.R. Part 100, Appendix A 17, 20

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION TO PETITION

SUMMARY OF ARGUMENT

This case presents no factual or legal question meriting review by this Court.[1] Petitioners assert that the Court of Appeals abdicated its statutory obligation to review decisions of the Nuclear Regulatory Commission by "blindly deferring" to the Commission in the name of scientific uncertainty. They further contend that the Court of Appeals either misunderstood

[1] A copy of the joint appendix filed with the Court of Appeals is being lodged with the office of the Clerk of this Court concurrent with the filing and service of this brief.

or completely ignored all of petitioners' arguments below. Even a cursory review of the Court of Appeals' opinion and the record in this action, however, reveals that petitioners' claims are wholly without basis in law or fact.

Petitioners first contend that the Court of Appeals established a new and improper standard of judicial review requiring "blind deference" to the Commission in all cases involving scientific or technical uncertainty. Their characterization of the Court of Appeals' opinion is false. To the contrary, the Court of Appeals applied the long-recognized standard of judicial review of agency decisionmaking recently enunciated by this Court in *Baltimore Gas & Electric Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983), *i.e.*, a reviewing court must search for substantial evidence in the record supporting agency decisionmaking and ensuring that agency action is neither arbitrary nor capricious, but nevertheless must defer to the expertise of an administrative agency. The Court of Appeals followed the admonition of this Court that judicial deference is most warranted in cases involving scientific or technical uncertainty. Petitioner's claim that the Commission is not entitled to deference because members of the initial licensing board were not trained in earthquake sciences is both untimely and patently frivolous. The Court of Appeals, applying the appropriate standard of review, correctly concluded that substantial evidence supported the decision of the Commission.

Petitioners also claim that the Court of Appeals erred because it supposedly misunderstood or elected to ignore each of the evidentiary and procedural questions raised below by petitioners. Once again, a review of the Court of Appeals opinion and the record demonstrates that (a) the Commission complied with all substantive and procedural regulations governing this licensing proceeding, (b) the Court of Appeals addressed—and rejected—each issue raised by petitioners, and (c) the court correctly determined that substantial evidence supported the factual findings of the Commission. In short, the

only real ground for a writ of certiorari offered by petitioners is that they are unhappy with the outcome of this litigation. That is not a basis for review by this Court.[2]

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS APPLIED THE PROPER STANDARD OF REVIEW TO AFFIRM THE DECISION OF THE COMMISSION

The only question of law presented by petitioners is their contention that the Court of Appeals applied the wrong standard of review when it affirmed the decision of the Nuclear Regulatory Commission. Petitioners' claim, however, is wholly without merit. To the contrary, the Court of Appeals applied a standard of review consistent with the standards set forth by this Court, the District of Columbia Circuit and other Courts of Appeals for review of administrative agency decisions—especially those involving highly technical questions such as those raised in this action.

A. The Standard Of Review Articulated And Applied By The Court Of Appeals Is Consistent With Supreme Court And Court Of Appeals Precedent

The scope of judicial review of decisions rendered by the Commission is limited by statute to whether the Commission's decision is supported by substantial evidence, and whether it is arbitrary and capricious or otherwise without basis in law. 42 U.S.C. § 2339; 5 U.S.C. § 706. The restrictions and obligations of reviewing courts under this standard are well-settled.

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[2] Petitioners' statement of the case includes several representations concerning the procedural history of this litigation which have been taken out of context and thus fail to fully describe the proceedings below. These matters include the continuity of intervenors in the construction and licensing proceedings before the Commission, the four years (and not ten months as suggested by petitioners) for discovery allowed petitioners by the Commission and the determination by the original intervenors at the construction permit stage in 1973 that the incapability of the Cristianitos Fault did not merit adjudication. In the interest of clarity and brevity, however, these matters will be addressed in Section III, *infra*.

This Court recognizes that the standard of judicial review under the Administrative Procedure Act "is a narrow one" which presumes agency action to be valid. *Citizens To Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 415-16 (1971); *accord, County of Rockland* v. *U.S. Nuclear Regulatory Commission,* 709 F.2d 766, 776 (2d Cir. 1983), *cert. denied,* 104 S. Ct. 485 (1983) ("the courts have cautioned that the [A.P.A.] Section 10(e) standard of review is 'narrow.' "); *Lead Industries Ass'n* v. *Environmental Protection Agency,* 647 F.2d 1130, 1145 (D.C. Cir. 1980), *cert. denied,* 449 U.S. 1042 (1980) ("the 'arbitrary and capricious' standard of review is highly deferential and presumes agency action to be valid"). This standard of review "forbids the court's substituting its judgment for that of the agency," *Ethyl Corp.* v. *Environmental Protection Agency,* 541 F.2d 1, 34 (D.C. Cir. 1976), *cert. denied,* 426 U.S. 941 (1976), and requires affirmance if there is a rational basis for the agency's decision. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 290 (1974); *Ethyl Corp., supra,* 541 F.2d at 34.

A reviewing court is to be deferential to agency decisionmaking when an agency has been delegated discretion by Congress to apply and interpret the statutes and regulations it administers. *See Federal Elections Commission* v. *Democratic Senatorial Campaign Committee,* 454 U.S. 27, 37 (1981); *North Anna Environmental Coalition* v. *Nuclear Regulatory Commission,* 533 F.2d 655, 659 (D.C. Cir. 1976).

It is beyond dispute that an agency is owed particular deference by a reviewing court when the subject of agency decisionmaking involves scientific or technical questions within the expertise of the agency. As this Court recognized in *F.P.C.* v. *Florida Power & Light Co.,* 404 U.S. 453, 463 (1972), affirming a Federal Power Commission determination based on scientific testing that a power company generated energy that was transmitted in interstate commerce,

> [a] court must be reluctant to reverse results supported by such a weight of considered and carefully articulated expert opinion. Particularly *when we consider a purely factual question within the area of competence of an*

> *administrative agency created by Congress,* and when resolution of that question depends on 'engineering and scientific' considerations, *we recognize the relevant agency's technical expertise and experience, and defer to its analysis unless it is without substantial basis in fact.* [emphasis added].

Although a reviewing court must delve into the record underlying scientific or technical questions, the courts have recognized that

> it is appropriate to sound some notes of caution about the limits of this exercise. First, we would be less than candid if we failed to acknowledge that we approach the task of examining some of the complex scientific issues presented in cases of this sort with some diffidence. More important, we stress that our review of the evidence is not designed to enable us to second-guess the Agency's expert decisionmaker [citation omitted]. *Congress has entrusted the Agency [E.P.A.] with the responsibility for making these scientific and other judgments, and we must respect both Congress' decision and the Agency's ability to rely on the expertise that it develops.* [emphasis added].

Lead Industries Association v. *Environmental Protection Agency,* 647 F.2d 1130, 1146 (D.C. Cir. 1980), *cert. denied,* 449 U.S. 1042 (1980). As the court observed in *Ethyl Corp.* v. *Environmental Protection Agency,* 541 F.2d 1 (D.C. Cir. 1976), *cert. denied,* 426 U.S. 941 (1976), the courts must respect the limits of their institutional competence and the expertise of administrative agencies:

> After our careful study of the record, we must take a step back from the agency decision. We must look at the decision not as the chemist, biologist or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality.

541 F.2d at 36. *Accord, Public Citizen* v. *Foreman,* 631 F.2d 969, 975 (D.C. Cir. 1980) ("deference is especially prudent in areas involving scientific and medical controversies"); *Weyerhauser Co.* v. *Costle,* 590 F.2d 1011, 1026-27 (D.C. Cir. 1978); *State of Maine* v. *Kreps,* 563 F.2d 1043, 1050 (1st Cir. 1977) ("Where Congress has vested the authority to resolve technical questions of fact in a specialized administrative body with experience and expertise in that field, considerable deference is due its conclusions."); *Cayman Turtle Farm, Ltd.* v. *Andrus,* 478 F. Supp. 125, 131 (D.D.C. 1979) ("A reviewing Court is to be particularly deferential where an agency has been delegated discretion to reach decisions based upon technical and scientific data.").

Similarly, in *Weyerhauser Co.* v. *Costle,* 590 F.2d 1011 (D.C. Cir. 1978), the Court of Appeals upheld with one exception Environmental Protection Agency pulp and paper-mill effluent discharge limitations, recognizing that

> [i]n light of the structure and aims of the [Environmental Protection] Act and the breadth of authority delegated by it to the EPA to identify highly sophisticated control technology *in an area fraught with scientific uncertainty, our review function encounters significant limitations* in the substantive aspect where the given statutory standards are 'arbitrary,' 'capricious,' or 'abuse of discretion.' [emphasis added].

590 F.2d at 1025. The court noted that there are "obvious limitations upon the capacity of courts to deal meaningfully with arcane areas of knowledge of this kind," 590 F.2d at 1026. The court concluded that

> [i]ndeed, the mere fact that the counsel on both sides in this suit could draw upon the opinions of diverse experts sitting virtually at their elbows during preparation of their briefs, while we are forced to decide between their resulting arguments on the basis of our 'generalist' judicial backgrounds, argues for restraint on our part.

Id. Accord, Lead Industries Ass'n v. *Environmental Protection Agency,* 647 F.2d 1130, 1147 (D.C. Cir. 1980), *cert. denied,* 449 U.S. 1042 (1980) (E.P.A. ambient air quality standards for lead affirmed, with court recognizing need for deference on questions "at the very 'frontiers of scientific knowledge' " that by necessity require decisions resting "largely on policy judgments.").

Above all, it is clear that the rule of substantial deference is applicable to judicial review of decisions by the Nuclear Regulatory Commission. As the court observed in *North Anna Environmental Coalition* v. *Nuclear Regulatory Commission,* 533 F.2d 655, 658 (D.C. Cir. 1976),

> This petition for review raises issues of first impression regarding *the siting of a nuclear power reactor on a fault zone.* In doing so it presents for review actions of *an agency whose "regulatory scheme . . . is virtually unique in the degree to which broad responsibility is reposed in the administrative agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives." Siegal* v. *Atomic Energy Commission,* 130 U.S. App. D.C. 307, 312, 400 F.2d 778, 783 (1968). [emphasis added].

The court affirmed the Commission's ruling that the proposed reactor location was consistent with public health and safety. *Id.*[3]

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[3] The Courts of Appeals in other circuits also have recognized the unique breadth of discretion delegated by Congress to the Commission that necessarily limits the scope of judicial review of Commission decisions. In *County of Rockland* v. *U.S. Nuclear Regulatory Commission,* 709 F.2d 766 (2d Cir. 1983), *cert. denied,* 104 S. Ct. 485 (1983), for example, the Second Circuit recognized the special need for deference to the Commission when it affirmed a Commission decision against taking enforcement action concerning deficiencies in offsite emergency preparedness. The court recognized that

> Congress has given the Commission considerable latitude to decide the difficult questions that arise with respect to nuclear safety. *See Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.,* 435 U.S. 519, 543, 558, 98 S. Ct. 1197, 1219, 55 L.Ed. 2d 460 (1978). We will not unduly circumscribe that latitude by placing unwarranted restrictions on the agency review process.

709 F.2d at 776. The court concluded that "our review is deferential because the Commission and its staff have special expertise and a wide range of

This Court recently reaffirmed these fundamental principles of judicial review of Nuclear Regulatory Commission decisions in *Baltimore Gas & Electric Co.* v. *Natural Resources Defense Counsel, Inc.*, 462 U.S. 87 (1983). In *Baltimore Gas*, the Nuclear Regulatory Commission decided that nuclear power plant licensing boards should assume, for purposes of the National Environmental Policy Act, that the permanent storage of certain nuclear wastes would have no significant environmental impact and thus should not affect the decision whether to license a particular nuclear power plant. The Court of Appeals vacated and remanded these rules on the ground, *inter alia*, that the "zero-release" of nuclear waste assumption made by the Commission prevented the uncertainties surrounding that assumption from affecting individual licensing decisions.

This Court reversed the Court of Appeals. The Court emphasized the limited role of a reviewing court in passing upon Commission action:

> We are acutely aware that the extent to which this Nation should rely on nuclear power as a source of energy is an important and sensitive issue. Much of the debate focuses on whether development of nuclear generation facilities should proceed in the face of uncertainties about their long-term effects on the environment. *Resolution of these fundamental policy questions lies, however, with Congress and the agencies to which Congress has delegated authority,* as well as with state legislatures and, ultimately, the populace as a whole. *Congress has assigned the courts only the limited, albeit important, task of reviewing agency action to determine whether the agency conformed with controlling statutes.* As we emphasized in our earlier encounter with these very proceedings, "administrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as

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experience in nuclear power plant operation and safety." *Id. See also Westinghouse Electric Corp.* v. *Nuclear Regulatory Commission*, 598 F.2d 759, 771-72 (3d Cir. 1979); *Public Service Co. of New Hampshire* v. *Nuclear Regulatory Commission*, 582 F.2d 77, 82 (1st Cir. 1978), *cert. denied*, 439 U.S. 1046 (1978).

> mandated by statute . . . , not simply because the court is unhappy with the result reached." *Vermont Yankee,* 435 U.S. at 558, 98 S.Ct. at 1219. [emphasis add].

462 U.S. at 97. The Court observed that "the role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Id.* at 97-98.

In determining that the Commission's decision was not arbitrary or capricious, the Court placed the zero-release assumption in context by reviewing three factors relevant to the facts before the Court. The Court noted that the assumption was for a limited purpose, was only one element of the overall decision of the Commission, and

> [t]hird, a reviewing court must remember that the Commission *is making predictions, within its area of special expertise, at the frontiers of science.* When examining this kind of scientific determination, as opposed to simple findings of fact, *a reviewing court must generally be at its most deferential.* [emphasis added].

Id. at 103. Upon review of the "impressive" volume of proceedings before the Commission and the Commission's Statement of Consideration which showed that it had "digested this mass of materials and disclosed all substantial risks," *id.* at 99, this Court concluded that "it simply cannot be said that the Commission ignored or failed to disclose the uncertainties surrounding its zero-release assumption." *Id.* at 100.

B. The Court of Appeals Applied The Proper Standard Of Review And Correctly Determined That Substantial Evidence Supported The Commission's Decision

Petitioners base their claim to review by this Court on the contention that the Court of Appeals established a new standard of review in this action that conflicts with prior decisions of this Court and the District of Columbia Circuit. Petition at 32-33. They contend that under the Court of Appeals decision, "all that need be shown for an agency to avoid close judicial scrutiny is that the subject in controversy involves uncertainty in science and technology." Petition at 28. As a result, according

to petitioners, the Court of Appeals "deferred almost blindly to the NRC because the case involved uncertainty in science and technology." Petition at 31.

Nothing in the Court of Appeals opinion lends any support to petitioners' claim that the Court engaged in "blind deference" to the Commission. To the contrary, petitioners' argument blatantly mischaracterizes the Court of Appeals opinion. The opinion clearly demonstrates that the court reviewed the record as to each issue on appeal and determined that substantial evidence supported the Commission on every point. *See, e.g.,* Opinion of the Court of Appeals ("Opinion") at 10-20, 22-23, 26-28. In so doing, the court followed long-standing principles of judicial review of agency decisionmaking.

First, the Court of Appeals applied the statutory standard of review dictated by the Administrative Procedure Act when it determined that the Commission's decision "is supported by substantial evidence, and that its actions were not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See* 5 U.S.C. § 706 (1982)." Opinion at 10.

Second, relying on the direction of this Court in *Baltimore Gas* and its own understanding of the broad discretion delegated to the Commission as expressed in *Siegel,* the Court of Appeals observed that "the Supreme Court has made it crystal clear that our review of NRC licensing decisions is 'limited.' " Opinion at 9-10.

Third, the Court of Appeals observed that when reviewing Commission decisionmaking in the scientifically uncertain area of predicting a safe shutdown earthquake, "it is in these substantive areas that this court's deference to the agency justifiably reaches its zenith." Opinion at 8. The Court of Appeals recognized that "[t]he uncertainty of the science of earthquake prediction only serves to emphasize the limitations of judicial review and the need for greater deference to policy-making entities," adding that, in light of *Baltimore Gas* and *F.P.C.* v. *Florida Power & Light Co.,* 404 U.S. 453 (1972), "[t]his is no startling or novel development." Opinion at 21.

Petitioners' protestation that this somehow constitutes a new and improper standard of review is specious. Their argument flies in the face of *F.P.C.* v. *Florida Power & Light Co.* and

Baltimore Gas, in which this Court emphasized the need for judicial deference in reviewing questions within the scientific or technical expertise of an administrative agency, and ignores *Weyerhauser Co.* v. *Costle,* 590 F.2d 1011 (D.C. Cir. 1978) and *Lead Industries Ass'n* v. *E.P.A.,* 647 F.2d 1130 (D.C. Cir. 1980), *cert. denied,* 449 U.S. 1042 (1980), which, along with *Baltimore Gas,* stress the need for heightened judicial deference in reviewing questions of scientific uncertainty.

Petitioners' contention that the Court of Appeals decision is in conflict with Supreme Court and District of Columbia Circuit precedent is equally without merit. First, they claim that because the Court of Appeals did not agree with petitioners that it was prejudicial error for the Licensing Board to "foreclose" consideration of whether the Cristianitos Fault was a capable fault, the court failed to "consider whether the decision was based on a consideration of all relevant factors" as required by *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402 (1971). Petition at 34-35. In fact, the Court of Appeals decision did not conflict with *Volpe*—it merely rejected petitioners' claim that any prejudicial error occurred concerning the Cristianitos Fault issue. Opinion at 11-16.

Second, they argue that the Court of Appeals opinion conflicts with *Greater Boston Television Corporation* v. *F.C.C.,* 444 F.2d 841 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1970), because they claim the court refused to take a "hard look" at the record in light of nine supposed "danger signals" of unfairness that petitioners contend mirror the one-sided hearing reversed in *Greater Boston.* Petition at 37-40. Once again, petitioners can point to nothing in the record even suggesting that the Court of Appeals refused to take a hard look at the Commission proceedings. In addition, the record demonstrates that the nine supposed danger signals are without any basis in fact. *See* Section III, *infra.*[4]

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[4] Petitioners suggest that they were treated as hostile opponents by the Licensing Board and the Commission. *See* Petition at 18-19. To the contrary, the Licensing Board ruled in favor of petitioners on several significant issues that required interlocutory guidance from the Commission. *See, e.g., G.U.A.R.D.* v. *Nuclear Regulatory Commission,* 753 F.2d 1144 (D.C. Cir. 1985) (medical services); *In the Matter of Southern California Edison Company et. al.* 14 N.R.C. 1091 (1981) (effect of earthquakes on emergency planning).

Third, they contend that the Court of Appeals opinion conflicts with *Ethyl Corp.* v. *E.P.A.*, 541 F.2d 1 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1976), which admonishes courts reviewing agency decisionmaking involving technical issues to engage in a substantial inquiry into the facts that is as intensive as the issues are technical, and not merely to "rubber-stamp" the agency decision as correct. Petition at 41-44. The Court of Appeals engaged in precisely the substantial inquiry contemplated by *Ethyl Corp.* A review of the opinion reveals that the court carefully reviewed the record and familiarized itself with the technical issues involved. Moreover, *Ethyl Corp.* makes clear that as a reviewing court conducts its searching review of the facts,

> that function must be performed with conscientious awareness of its limited nature. The enforced education into the intricacies of the problem before the agency is not designed to enable the court to become a super-agency that can supplant the agency's expert decisionmaker. To the contrary, the court must give due deference to the agency's ability to rely on its own developed expertise. The immersion in the evidence is designed *solely* to enable the court to determine whether the agency decision was rational and based on consideration of the relevant factors. [citation omitted].

541 F.2d at 36. Petitioner's contention that the Court of Appeals opinion conflicts with *Ethyl Corp.*—because it failed to recite the incantation that a reviewing court must not "rubber-stamp the agency decision as correct," *id.* at 34—ignores the analysis actually applied by the court.

Finally, petitioners argue that the Court of Appeals "misapplied" this Court's decision in *Baltimore Gas.* Petition at 45. They contend that in *Baltimore Gas,* (a) there was "no question" but that the Commission fully described all areas of uncertainty and how they were resolved, (b) this Court did not rule that uncertainty alone required substantial deference to agency decisionmaking, and that instead, (c) this Court "enumerated three factors supporting greater deference" in that case. Petition at 46-47.

It is clear that *Baltimore Gas* is directly applicable to this case and that the Court of Appeals properly analyzed this Court's opinion. As discussed in greater detail below, the Commission identified and reviewed in painstaking detail the areas of uncertainty and how they were resolved in determining the safe shutdown earthquake for the plant site. Moreover, petitioners' suggestion that the Court applied a three factor "test" for deference to the Commission is incorrect; the Court instead identified three factors that placed the zero-release assumption in context in order to determine whether the Commission's decision was arbitrary and capricious. 462 U.S. at 101. The Court, however, did observe as one of the bases upholding the zero-release assumption that

> a reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.

Id. at 103.[5]

Petitioners' contention that the Court of Appeals decision creates an improper standard of review conflicting with Supreme Court and District of Columbia Circuit precedent is without merit and is nothing more than a transparent effort to manufacture a basis for review by this Court. It should not succeed.

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[5] Petitioners' contention that the Commission is not entitled to deference because the members of the initial licensing board were not trained seismologists or geologists and thus the Nuclear Regulatory Commission lacks the expertise to which such deference customarily is directed borders on the frivolous, as shall be discussed in more detail below. *See* Section II, *infra.*

II.

PETITIONERS' CONTENTION THAT THE COMMISSION IS NOT ENTITLED TO DEFERENCE BECAUSE IT SUPPOSEDLY LACKS THE EXPERTISE TO APPLY ITS OWN REGULATIONS ON POWER PLANT LOCATION IS BOTH UNTIMELY AND WITHOUT MERIT

Petitioners apparently contend that the Court of Appeals erred by deferring to the Commission because the Licensing Board members are not seismologists or geologists and thus the Commission itself is not entitled to the deference customarily given to an administrative agency acting within its areas of expertise. Petition at 5-6, 30, 48. This argument is both untimely and without merit.

A. Petitioners' "Expertise" Argument Is Untimely

This Court ordinarily will not consider questions that were not raised before the administrative agency or courts below. *See, e.g., Adickes* v. *S.H. Kress and Company,* 398 U.S. 144, 147 (1970), *Lawn* v. *United States,* 355 U.S. 339, 362-63 (1958). Petitioners did not challenge the qualifications of the Licensing Board members at any time during the administrative proceedings. Petitioners failed to raise the expertise of the licensing board members as an issue in their opening brief to the Court of Appeals and made only a passing reference to it in their reply brief. Pet. Reply Brief at 27-28. They never argued to the Court of Appeals that the Commission was not entitled to deference because it lacked expertise. Petitioners' "expertise" argument has been raised for the first time in their petition for writ of certiorari; therefore, it is untimely and should not be considered by this Court.

B. The Court of Appeals Properly Deferred To The Expertise Of The Commission

In any event, petitioners' contention that the Commission is not entitled to deference because it lacks expertise borders on the frivolous. This argument reflects a fundamental misunderstanding of the principle of judicial deference to agency ex-

pertise. The deference owed by a reviewing court is to the Commission, not to the initial hearing officers. *See, e.g., Environmental Defense Fund, Inc.* v. *Environmental Protection Agency,* 489 F.2d 1247, 1252-53 (D.C. Cir. 1973) (court deferred to expertise of EPA Administrator, even where the hearing examiner "had no particular expertise in the subject matter"); *Stamper* v. *Secretary of Agriculture,* 722 F.2d 1483, 1486 (9th Cir. 1984) (reviewing court deference is to the agency, not the initial hearing officer whose findings are simply part of the record); *Penasquitos Village, Inc.* v. *National Labor Relations Board,* 565 F.2d 1074, 1076 (9th Cir. 1977) (same). The expertise of the Licensing Board, therefore, does not alter the substantial deference owed to the expertise of the Commission.

Second, petitioners do not and cannot contend that the Commission lacks the expertise to address the seismology and geology questions presented in this case. The Commission is experienced in addressing seismology issues raised in plant location controversies. *See, e.g., North Anna Environmental Coalition* v. *Nuclear Regulatory Commission,* 533 F.2d 655 (D.C. Cir. 1976). The Commission staff has substantial expertise in the seismic questions presented in this case.[6] Moreover, the Commission had the benefit of substantial expert evidence from the United States Geological Survey. *See, e.g.,* Joint Appendix ("J.A.") at 1175 *et. seq.* This staff and extra-agency expertise available to the Commission provides an additional basis for deference to the Commission's decision. *See generally Environmental Defense Fund* v. *Environmental Protection Agency,* 489 F.2d 1247, 1252 (D.C. Cir. 1973); *North Anna Environmental Coalition* v. *Nuclear Regulatory Commission,* 533 F.2d 655, 662 (D.C. Cir. 1976).[7]

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[6] The Division of Site Safety and Environmental Analysis of the Commission's Office of Nuclear Reactor Regulation, for example, is specifically entrusted to evaluate "site adequacy from the standpoints of geology, seismology" and other sciences. 10 C.F.R. § 1.61(b).

[7] Petitioners presume that the Licensing Board members lacked the technical competence necessary to decide the questions before it, even though two of the three board members possessed scientific and technical backgrounds. Similarly, they offer no evidence that the Licensing Board members were not experienced in addressing nuclear power plant location issues.

The implications of petitioners' contention that a reviewing court must sit in judgment of the qualifications of each agency decisionmaker before determining the appropriate standard of review threaten the delicately balanced and carefully crafted limitations on role of the judiciary in reviewing actions by agencies to which Congress has delegated legislative power to make decisions through administrators appointed by the executive branch. *See generally Weyerhauser Co.* v. *Costle,* 590 F.2d 1011, 1025 (D.C. Cir. 1978) (in reviewing agency rulemaking, court must have due concern "for the 'boundaries between the legislative and the judicial function.' "). Petitioners' argument similarly undermines the theoretical basis of the doctrine of primary jurisdiction; courts need not determine whether individual agency decisionmakers possess sufficient expertise before deciding whether to decline jurisdiction *ab initio* over regulatory matters. *Cf. Nader* v. *Allegheny Airlines,* 426 U.S. 290, 304 (1976).

Petitioners do not and cannot offer any support for the proposition that a court of appeals reviewing agency decisionmaking must first engage in a *de novo* review of the qualifications of individual agency decisionmakers before determining the appropriate standard of review. Petitioners' "expertise" argument is untimely, frivolous, and should not provide a basis for review by this Court.

III.

THE COURT OF APPEALS CORRECTLY PERCEIVED AND APPLIED THE FACTUAL EVIDENCE ON WHICH ITS DECISION IS BASED

Petitioners present an assortment of allegations challenging the factual determinations of the Court of Appeals. In each instance, petitioners claim the Court of Appeals has "misapprehended" petitioners' position. Petition at 48-64. Petitioners do not challenge the record basis or deny that there is a record basis for the Court of Appeals' rulings; they merely argue that they are incorrect. Petitioners also argue that

identical rulings by the Commission should have been considered "danger signals" by the Court of Appeals, *i.e.*, they should have been considered indications that the Commission had not taken a "hard look" at the problems before them. Petition at 37-41. Petitioners disregard the statutory requirement that a finding of fact by an administrative agency must be upheld if it is supported by substantial evidence and is not arbitrary, capricious or an abuse of discretion. 5 U.S.C. 706(2)(A)(E); *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 415-17 (1971). The following discussion will attempt to return the issues to their proper context.

A. The Court of Appeals Understood Completely Petitioners' Unfounded Attempt To Litigate The Incapability Of The Cristianitos Fault

Petitioners complain they were prevented from litigating whether the Cristianitos is an incapable fault. They proceed as though there was an unfettered right to raise any issue desired during the course of the hearing. The question of whether the Cristianitos Fault is incapable within the meaning of 10 C.F.R. Part 100, Appendix A, Section III, (g),[8] was not an admitted issue as of the start of hearings. Petitioners had disavowed any interest in the issue in 1977. J.A. at 23-25. In 1981, immediately prior to hearing, petitioners attempted to raise it without articulating any basis. J.A. at 519. Petitioners again attempted to raise the issue during hearing through the testimony of Mr. Richard Simons. The proposed testimony of Mr. Simons was heard and subjected to cross-examination. The

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[8] 10 C.F.R. Part 100, Appendix A, Section III, (g) provides:

A "capable fault" is a fault which has exhibited one or more of the following characteristics:

(1) Movement at or near the ground surface at least once within the past 35,000 years or movement of a recurring nature within the past 500,000 years.

(2) Macro-seismicity instrumentally determined with records of sufficient precision to demonstrate a direct relationship with the fault.

(3) A structural relationship to a capable fault according to characteristics (1) or (2) of this paragraph such that movement on one could be normally expected to be accompanied by movement on the other.

Licensing Board rejected the evidence as lacking in probative value. The Court of Appeals found the Licensing Board's exclusion of the evidence to have been proper and cited petitioner's failure to make any further offer of proof. Opinion at 16.

There is no "misapprehension." Petitioners failed to raise the issue in a timely manner, could not offer probative evidence on the issue when given the opportunity and made no further offer of proof. The Court of Appeals ruling is correct.

B. Petitioners' Proposed Interpretation Of The Offshore Zone Of Deformation As A Stipulated Continuous Fault Is A Flagrant Misinterpretation Of The Facts

Petitioners complain that the Court of Appeals has incorrectly accepted the Licensing Board's characterization of the controlling geologic feature for the San Onofre site, the Offshore Zone of Deformation ("OZD"), as a segmented zone of faults and folds rather than a continuous throughgoing fault. They contend that intervenors had stipulated that the OZD is a contiguous, throughgoing fault. Petitioners' argument is a distortion of the record. As early as 1973, the Licensing Board in the construction permit proceeding stated "an honest difference of opinion exists between the experts on the two sides as to the proper geological model to use," and that "there may even be a small preponderance of the evidence" in favor of the applicants' interpretation of the geological data. 6 AEC 929, 943; J.A. at 454.

Intervenors consistently have maintained that the old USGS model did not accurately describe the OZD. Tr. 313, 317, 1043-1055, J.A. at 4, 5, 25-37; "Applicants' Response to Revised Contentions of Intervernors FOE, *et al.*, submitted May 5, 1981" dated May 12, 1981, J.A. at 1286. At most, intervenors agreed that the three segments of the OZD would be treated as a 240 kilometer-long linear zone of deformation for purposes of calculating the potential magnitude of an earthquake along the OZD. Tr. 1047, J.A. at 29.

Petitioners attempt to rely on a *portion* of the USGS testimony cited by the Court of Appeals. Petitioners, however, have omitted the lead sentence of the excerpt quoted by the court:

> "[The USGS model] specifically avoided the term 'fault zone.' We called it a zone of deformation because there are indeed segments which are not faulted, but instead deformed, folded, for example."

Opinion at 17. The clinching testimony of USGS representative Mr. Devine relied upon by the Court of Appeals was:

> "No. As I recall, *none of us had the opinion or the position that the entire length could rupture at once,* but only that there was indeed some relationship, probably at depth, of these three segments such that it all should be considered one zone."

Opinion at 18. The Court of Appeals did not misapprehend the facts.

C. Petitioners' Construction Of Dr. Slemmons Testimony Is Again Without Merit

Petitioners continue to propose interpretations of the facts that are not sustained by a fair reading of the record. With respect to Commission witness Dr. Slemmons, petitioners continue to assert an interpretation of his testimony rejected by the witness and every decision in this proceeding. Petitioners now fault the Court of Appeals on the ground petitioners find a transcript reference subsequent to that cited by the Court of Appeals as a basis for its determination. Petition at 56.

Petitioners ignore the Court of Appeals finding that the conclusion arrived at by Dr. Slemmons is supported by other competent evidence:

> More fundamentally, however, [petitioners] ignore the Appeal Board's express finding that even excluding the testimony assailed by petitioners, "[t]he choice of a Ms 7.0 safe shutdown earthquake for San Onofre is amply supported by *other expert testimony* in the record," particularly the testimony of Drs. Smith and Ehlig. Appeal Board Decision at 709 n.40, J.A. at 631. [emphasis added].

Opinion at 19. This Court cannot ignore the substantial evidence in support of the Court of Appeals determination. Petitioners' allegations are not a proper subject for review by this Court.

D. The Court Of Appeals Correctly Reviewed The "Conservatism" Of The Commissions' Findings

Petitioners complain that the Court of Appeals "misapprehended" the issue of whether the Commission's determination of the safe-shutdown earthquake was done in a "conservative manner" as required by 10 C.F.R. Part 100, App. A § V(a)(1)(iv). Petition at 58. Petitioners do not complain that the Commission was arbitrary or capricious, or that its determination is not backed by substantial evidence. Their complaint is that neither the Commission nor the Court of Appeals followed the test of conservatism proposed by petitioners.

> The Court of Appeals correctly cited the Commission's statutory mandate to "provide adequate protection to the health and safety of the public" as requiring not a risk-free environment, but a "reasonable assurance . . . that the reactor would be safely operated at the proposed location." [citations omitted]. . . . After examining the record, both the evidence for and against the Commission's findings, we find those findings amply supported by substantial evidence.

Opinion at 22. Petitioners refuse to accept that the Court of Appeals specifically rejected their proposed tests calling for a quantification of risks. The Court of Appeals addressed petitioners' complaint and found that the Commission had acted in a "conservative" manner in making the numerous judgments necessary to arrive at its ultimate conclusion. The Court of Appeals did not "miss the point." To the contrary, it dealt specifically with petitioners' argument and rejected it specifically. Opinion at 24-25.

E. Petitioners' Interpretation Of 10 C.F.R. § 2.752 Remains Frivolous

Petitioners complain that the Court of Appeals characterized their argument relative to the proper interpretation 10 C.F.R. § 2.752(a) as "patently frivolous." Petition at 61-64.

That section states:

> A prehearing conference held under this section in a proceeding involving a construction permit or operating license shall be held within 60 days after discovery has been completed or such other time as the Commission or the presiding officer may specify.

Petitioner's argument is that the *intent* of the provision is to require a special prehearing conference only after discovery is complete. According to petitioners, the plain language allowing the Commission or presiding officer to set a conference at some other time is to be read out of the regulation. As stated by the Court of Appeals, the contention is "patently frivolous." Opinion at 26.

F. The Commission's Regulations Do Not Require Litigation Of The Capability Of The Cristianitos Fault

Petitioners allege that the Court of Appeals and the Commission were required to litigate the incapability of the Cristianitos Fault because it lies within 200 miles of the site and because it has allegedly experienced movement within the last 35,000 years and recurring movement within the last 500,000 years. Petition at 37. It is notable that petitioners do not cite the record for their statement that the Cristianitos Fault has moved within the last 35,000 years or experienced recurring movement in the last 500,000 years. The reason for the missing citation is that no such evidence was developed or tendered. Petitioners' allegation again is baseless.

Petitioners argument is based on a premise that because the Commission must review all faults within 200 miles of the site, it also is necessary to litigate their incapability. Petition at 37. It is not necessary to litigate every item reviewed by the

Commission in licensing a nuclear facility. As petitioners know well, a hearing on an operating license application is not even required unless requested by an interested party. Atomic Energy Act, 42 U.S.C. § 2239(a). Further, in order to litigate an issue in an operating license proceeding, it must be specifically raised and a basis for the issue articulated. 10 C.F.R. § 2.714(b). Petitioners have not been able to meet this standard. *See, supra,* at 17-18. Petitioners' attempt to raise a Commission *review* item to the level of a required issue for litigation must fail.

G. Petitioners' Statement Of Facts Is Replete With Arguments Previously Denied By The Court Of Appeals

Petitioners set forth what they characterize as "Statement of Facts Upon Which Error at the Administrative Level is Based." Petition at 18-28. Petitioners ask that this statement be read in the context of a party that has been severely prejudiced by an unfair administrative tribunal. Petition at 18. The section is not a statement of fact but, rather, a restatement of arguments previously addressed and denied by the Court of Appeals. Many of petitioners' allegations have been addressed in Section III A-F, *supra.* The following addresses the allegations not previously discussed.

1. Intervenors Had Ample Time To Prepare Their Case.

The Court of Appeals decision accurately reflects the true timetable leading to hearing. Opinion at 25-27. Petitioners intervened in the proceeding in 1977 and had until mid-1981 (more than three years) available for discovery. That the pace of preparation increased immediately prior to hearing is not a ground for appeal. The Court of Appeals correctly found no unfairness with respect to schedule or legal representation.

2. Admission Of The FSAR Was Not Reversible Error.

Petitioners recite an evidentiary issue on which they did not prevail, *i.e.,* whether the Final Safety Analysis Report should have been admitted to evidence. The Court of Appeals correctly determined that because neither intervenors nor the Licensing Board relied on its contents, the error, if any, was harmless. Opinion at 22-24.

3. The Commission Accorded Proper Weight To The Testimony Of Drs. Luco And Boore.

Petitioners state that the Licensing Board "ignored and totally misconstrued" the testimony of Drs. Luco and Boore. Petition at 26. Petitioners again present no more than a simple disagreement over how the trier of fact viewed the evidence. Moreover, the Court of Appeals disposed of that purported issue in a reasoned manner based on substantial evidence.

Petitioners' listing of the issues and arguments they previously have lost is irrelevant. The arguments were individually without merit and cumulation does not add validity. Petitioners do not present any issues worthy of this Court's review.

CONCLUSION

For the foregoing reasons, intervenors request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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